KHOO YONG SENG

v.

NG CHOO PENG & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-22-932-2001]
30 DECEMBER 2002

LAND LAW: *Indefeasibility of title and interests - Plaintiff applied for vacant possession - Whether plaintiff had an indefeasible title to property - Whether title defeated by s. 340 National Land Code - Whether defendants were gratuitous or bare licensees - Whether plaintiff could revoke licence at will and at any time - Doctrine of equitable estoppel - Whether there was evidence of any inducement, encouragement or expectation held out by plaintiff to defendants to expend money on property - Whether a legal relationship existed between parties*

EVIDENCE: *Best evidence - Oral evidence contradicting written terms and conditions of sale and purchase agreement - Whether s. 92 Evidence Act 1950 applied to exclude oral evidence*

CIVIL PROCEDURE: *Summons-in-chambers - Application for vacant possession and striking out counterclaim - Whether summons-in-chambers defective - Whether justice of case overrides technical non-compliance of rules - Rules of the High Court 1980, O. 1A, O. 2 r. 3*

The plaintiff was the registered proprietor of a property ('the property') occupied by the defendants. The property was previously owned by a company in which the plaintiff's late father and the first defendant were the only directors and shareholders thereof. The first defendant was the plaintiff's late father's second wife whilst the second defendant was his stepsister. After the death of his father, the events that followed led to the plaintiff's application by way of a summons in chambers, *inter alia*, for vacant possession of the property. The deputy registrar allowed the plaintiff's application. Hence, the defendants' appeal.

The issues were: (1) whether the relevant sale and purchase agreement ('S&P') contained a clause for vacant possession; (2) whether the plaintiff had an indefeasible title to the property; (3) whether the doctrine of equitable

estoppel was applicable; and (4) whether the plaintiff's application by way of a summons-in-chambers was defective as it contained both an order for vacant possession and an order for striking out the defendants' counterclaim.

Held:

[1] The S&P clearly showed that the sale was with vacant possession. This piece of evidence went against the grain of the first defendant's averment that the S&P did not contain a clause giving the plaintiff vacant possession thereof. Section 92 of the Evidence Act 1950 applied to exclude evidence of any oral agreement or statement for the purpose of contradicting, varying, adding to or subtracting from its terms. (pp 201 h, 202 a-h & 203 a)

[2] The plaintiff was the registered proprietor of the property and therefore obtained an indefeasible title to it. The indefeasibility of his title was not defeated by any of the circumstances enumerated in s. 340 of the National Land Code. At best, the defendants were gratuitous or bare licensees. The plaintiff as the licensor could revoke the licence at will and at any time. Also, the doctrine of equitable estoppel did not apply in favour of the defendants. This was because there was no evidence of any inducement, encouragement or some expectation held out by the plaintiff to both the defendants, on the strength of which both of them expended money on the property. Further, there was no legal relationship whatsoever between the plaintiff and the defendants. The death of the plaintiff's father brought an end to everything. As a registered proprietor, the plaintiff was entitled to vacant possession. (pp 206 b, h, 207 g-h, 208 a & 213 e)

[3] Notwithstanding the manner in which the plaintiff's application was framed and phrased, there was no substantial miscarriage of justice (O. 1A, O. 2 r. 3 Rules of the High Court 1980). (p 220 b-g)

[Appeal dismissed.]

Case(s) referred to:

Associated Credit Corporation Sdn Bhd v. Fahlum Development Sdn Bhd & Anor [1990] 2 CLJ 952; [1990] 1 CLJ (Rep) 615 HC ***(refd)***

Bank Bumiputra Malaysia Bhd v. Mahmud Hj Mohamed Din [1989] 1 CLJ 1048; [1989] 1 CLJ (Rep) 326 HC ***(refd)***

Bristol Corp v. Persons Unknown [1974] 1 All ER 593 ***(refd)***

Cowell v. The Rosehill Racecourse Co Ltd [1937] 56 CLR 605 ***(refd)***

Damu Jadhao v. Paras Nath Singh [1965] 2 MLJ 38 ***(refd)***
Devi v. Francis [1969] 2 MLJ 169 ***(dist)***
Fels v. Knowles 26 NZLR 604 ***(refd)***
Greater London Council v. Jenkins [1975] 1 All ER 354 ***(refd)***
Hardwick v. Johnson & Anor [1978] 1 WLR 683 ***(refd)***
Koh Siak Poo v. Perkayuan OKS Sdn Bhd [1989] 1 CLJ 30; [1989] 2 CLJ (Rep) 1 HC ***(refd)***
Krishnadas Achutan Nair & Ors v. Maniyam Samykano [1993] 4 CLJ 247 HC ***(refd)***
Lebai Taib v. Abdul Ghani & Anor [1973] 1 MLJ 109 FC ***(refd)***
Lee Wah Bank Ltd v. Ng Kim Lek & Ors [1979] 1 MLJ 21 FC ***(foll)***
Martinali v. Ramuz [1953] 1 WLR 1196 ***(refd)***
Meye v. Electric Transmission Ltd [1942] Ch 290
Ong Chat Pang & Anor v. Valliappa Chettiar [1971] 1 MLJ 224 FC ***(foll)***
Petronas Dagangan Sdn Bhd v. Omar Abdul Samad [1996] 4 MLJ 391 ***(refd)***
PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd [1980] 2 MLJ 136 ***(refd)***
Siew Soon Wah & Ors v. Yong Tong Hong [1973] 1 MLJ 133 ***(dist)***
Tan Chong & Sons Motor Company (Sdn) Bhd v. Alan McKnight [1983] 1 CLJ 77; [1983] CLJ (Rep) 394 FC ***(refd)***
Tan Chong And Sons Motor Company Ltd v. Yang Chin Lang [1967] 1 MLJ 123 ***(refd)***
Tanner v. Tanner [1975] 1 WLR 1346 ***(refd)***
Teh Bee v. K Maruthamuthu [1977] 2 MLJ 7 FC ***(refd)***
Thomas v. Sorrell [1675] Vaugh 330 ***(refd)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 2 MLJ 229 ***(foll)***
Tyagaraja Mudaliar & Anor v. Vedathanni [1936] MLJ Rep 62 ***(refd)***
Wee Kang Whye & Anor v. Lee Woon Tong [1974] 1 MLJ 7 ***(refd)***
Yeap Cheng Hock v. Kajim-Taisei Joint Venture [1973] 1 MLJ 230 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 91, 92, 93, 94, 95, 96, 97, 98, 99
National Land Code, s. 340(1), (2)
Rules of the High Court 1980, O. 89 r. 1
Rules of the Supreme Court, O. 113 r. 1

Other source(s) referred to:
Halsbury's Laws of Malaysia, vol 8, pp 548, 549, 552

For the plaintiff - M Pathmanathan; M/s M Pathmanathan & Co
For the defendants - Francis Brigged; M/s Francis Brigged & Co

[The defendants have filed an appeal to the Court of Appeal vide Civil Appeal No: W-02-922-03]

Reported by Usha Thiagarajah

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JUDGMENT

Abdul Malik Ishak J:

Introduction

By way of a summons in chambers in encl. 6, the plaintiff sought for the b following orders:

(a) the defendants do give possession of the property known as No: 18, Jalan Inai, Off Jalan Imbi, Kuala Lumpur held under GRN 33300 Lot 236 Seksyen 0067 Bandar Kuala Lumpur (hereinafter referred to as the "property") to the plaintiff within 14 days of this order;

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(b) damages for wrongful occupation of the premises be assessed; and

(c) that the defendants' counterclaim be dismissed with costs.

Enclosure 6 was supported by an affidavit affirmed by Dato' Khoo Yong d Seng – the plaintiff herein, on 11 January 2002 as seen in encl. 5. By way of a response to encl. 5, the first defendant affirmed an affidavit styled as an "affidavit in reply of 1st defendant (No. 1)" on behalf of herself and she too made that affidavit on behalf of the second defendant and this very affidavit was affirmed by the first defendant on 25 January 2002 as seen in encl. 8. The plaintiff then affirmed an affidavit in reply on 10 April e 2002 as seen in encl. 10 and this affidavit in reply responded to encl. 8. The first defendant responded to encl. 10 by affirming an affidavit in reply styled as the "1st defendant's affidavit in reply (No. 2)" on behalf of herself and the second defendant and it was affirmed on 6 May 2002 as seen in encl. 9. The plaintiff responded to encl. 9 by affirming an affidavit in encl. f 11A and the affirmation was effected on 21 May 2002.

Incidentally, it would be ideal to mention that the writ of summons can be seen in encl. one (1) and the statement of claim can be seen in encl. 2. The statement of defence carries with it a counterclaim and it can be seen g in encl. 4. While the reply and defence to counterclaim can be found in encl. 7.

The deputy registrar heard encl. 6 and on 16 July 2002 she gave order in terms of encl. 6 in favour of the plaintiff. Aggrieved by that decision the defendant filed a notice of appeal to the judge in chambers on 18 July 2002 h and this can be seen in encl. 13 thereto.

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Facts Of The Case

The plaintiff is a businessman and the registered proprietor of the said property. The said property was previously owned by Toong Aik Development Sdn Bhd (hereinafter referred to as the "company"). The plaintiff's late father by the name of Dato' Khoo Meng Kee together with the first defendant were the only directors and shareholders of the company. The defendants and occasionally the plaintiff's late father occupied the said property whilst it was owned by the company. Pursuant to a sale and purchase agreement dated 20 January 1988 that was entered into between the company and the plaintiff's nominee by the name of Chan Kun Hong, the said property was purchased by Chan Kun Hong for a consideration of RM603,000. By a letter of novation dated 2 May 1988, Chan Kun Hong authorised and directed the company to transfer the said property direct to the plaintiff and this was accordingly done. For all intents and purposes, the plaintiff is now the registered proprietor of the said property.

The plaintiff's father died on 13 January 2001. With his death, trouble started to show its ugly head.

The plaintiff have personally and through his solicitors asked the defendants to quit occupation and deliver up vacant possession of the said property but the defendants have failed, neglected and/or refused to do so and alleged that the plaintiff had orally assured them that they could occupy the said property "for as long as they live and for as long as they wish." The plaintiff, on the other hand, denied ever orally or otherwise agreeing to such terms and the plaintiff says that these terms are unreasonable. The plaintiff also says that it does not stand to reason or make any commercial sense for him to purchase the said property for the sum of RM603,000 and at the same time to allow the defendants to occupy the said property "for as long as they like and for as long as they live". The plaintiff also says that if there is an iota of truth to the defence, the defendants who were legally represented in the sale and purchase agreement would have ensured that such a term was expressly included in the sale and purchase agreement. Needless to say such a clause was not included in the sale and purchase agreement. And flowing from that the plaintiff says that there was no such clause in the sale and purchase agreement simply because no intending purchaser would agree to purchase a property where the vendor had the right to occupy that property "for as long as they like and for as long as they live."

The plaintiff throws a dare when he says that the defendants should have some documentary proof to support the existence of the defendants' right to stay in the said property "for as long as they like and for as long as

they live." The plaintiff verily believes that the defendants' self serving defence of an oral agreement is wholly frivolous and without any basis and is advanced only to delay their eviction and to continue occupation of the said property free of charge at the expense of the plaintiff and to the detriment of the plaintiff. The plaintiff also verily believes that there is no defence to his claim for possession in his capacity as the registered owner of the said property and the plaintiff also believes that a trial of this action would be a waste of the court's time since the defendants have no evidence except their self-serving defence.

The defendants responded and they say that they verily believe that there is a delay in the filing of the plaintiff's summons in chambers in encl. 6 and that no reasonable explanation has been given for the delay. The defendants are instructed to say and they verily believe that the plaintiff is not permitted to seek an order for vacant possession and an order for striking out of the defendants' counterclaim in the same summons in chambers in encl. 6. I take it that there is an objection to the effect that encl. 6 as phrased is defective and that it contravenes the Rules of the High Court 1980. I will revert to this issue at the later part of this judgment. Suffice for me to say, at the moment, that the objection is without merit. In the meantime, I will proceed with the narration of the facts.

The first defendant says that she is the lawful wife of the late Dato' Khoo Meng Kee having been married to him under and in accordance with the Chinese customary rites. It appears that the late Dato' Khoo Meng Kee is not only the father of the plaintiff but also of the second defendant as well. That makes the second defendant to be the plaintiff's stepsister.

The first defendant says that her husband the late Dato' Khoo Meng Kee always stayed at the said property and not occasionally as alleged. She even referred to the death certificate of the late Dato' Khoo Meng Kee which listed his last address at the said property. The first defendant then proceeds to explain as to why the said property was sold by the company to the plaintiff through his nominee. She says that the sale was effected in order to avoid the said company from defaulting in its loan to the Hongkong Shanghai Banking Corporation. She explains that the nominee and not the plaintiff was named in the sale and purchase agreement and this was done solely to induce the bank to accept a lower redemption sum in order to redeem the said property. She emphasises that the deposit of RM120,000 was paid directly to the bank and this, according to her, shows the extent of the company's financial problem. She verily believes that had the sale and purchase agreement been at arm's length bargain, the deposit would

have been paid to the company and not to the bank. She further says that the consideration of RM603,000 for the purchase of the said property was considerably lower than the market value. She explains that the property has an area of 21300 square feet and it is located in the heart of the commercial area and it was transacted at RM28.31 sen per square foot when at the material time the price was very much higher. All these, according to her, would show that the said property was transacted on the express condition that the defendants and the late Dato' Khoo Meng Kee could stay in the said property for as long as they wished and lived. The first defendant refers to para. 9 of the sale and purchase agreement and she states that because the company was legally represented, the agreement does not contain a clause giving the plaintiff vacant possession of the property upon completion. She verily believes that such a clause would be found in every sale and purchase agreement in respect of land except where the property is being sold subject to the previous occupants' interest. She says that since both her late husband and herself were the only directors and shareholders of the company and that since both of them were occupying the property at the time of the agreement, it stands to reason that the said property being transacted without a provision for vacant possession so that they could continue to occupy the said property even after the transaction was concluded. She says that the solicitors were obviously aware of this condition and so the clause for vacant possession was excluded in the agreement. She then proceeds to say that the sale of the said property by the company to the plaintiff's nominee was on the express condition that her late husband, the second defendant and herself be allowed to stay in the said property for as long as they wish and as long as they live. In regard to the averment at para. 3 of the plaintiff's statement of claim wherein it is alleged that the plaintiff granted permission to occupy the said property only to his late father, the first defendant has this to say. That permission too was granted to herself and her daughter – namely, the second defendant. She further states that the second defendant stays on the said property with her permission. She says that it does not make sense for the plaintiff to say that only her late husband was granted the permission to stay on the property when she herself was also a director and a shareholder of the said company which owned the property at the material time. She further says that the plaintiff had never during her late husband's lifetime informed her or the second defendant that they had to leave the said property once her late husband died. She says that the plaintiff had never made such a demand because he was well aware of the circumstances in which the property was transferred to him. She verily believes that there are several triable issues and that the plaintiff's application for vacant possession is

misconceived and ought to be dismissed with costs. She also verily believes that the plaintiff has failed to show the reasons in his affidavit as to why the defendants' counterclaim ought to be struck off and so she prays that the plaintiff's application in encl. 6 be dismissed with costs.

The plaintiff does not stand idle. He responds and he says that there is no undue or inordinate delay in filing the application in encl. 6 and that no prejudice whatsoever was occasioned to the defendants. He says that the nub of the issue is that he is the registered proprietor of the said property in question having purchased the same for valuable consideration and that the defendants have no legal right to continue occupation of the said property. He verily believes that the allegation of delay is merely to detract this court from the core issue and to delay these proceedings and in the meantime to continue their free and unlawful occupation of the said property at his expense and to his detriment. He is advised by his solicitors and he verily believes that it is in order and proper to pray for the reliefs which he sought in the one and same application. He says that this is because the defendants' counterclaim is grounded on the premise that they are, in law, entitled to occupy the said property for as long as they live. He says that if the court finds that the defendants have no defence to his claim then the striking out of the counterclaim follows as a matter of course because it is merely a consequential order. I pause here to say that I would certainly agree with the plaintiff's stand. He further says that the first defendant is not the lawful wife of his late father and that the second defendant is not the biological offspring of either of them. He says that the birth certificate of the second defendant is not conclusive proof of who the natural parents of the second defendant are. He then refers to para. 3 of the defendants' reply to the defence and counterclaim where the defendants have now admitted that his late father merely "accepted the second defendant as his lawful daughter and it is irrelevant whether or not the late Khoo Meng Kee or the first defendant are the natural biological parents of the second defendant." He says that the sale and purchase agreement is evidence of the sale of the property from the previous owner – the company, to him. He says that the sale was at an arm's length transaction and the price was negotiated and agreed between the parties. He says that the defendants' contentions are without basis and that they are estopped from adducing evidence to contradict the written terms and conditions of the sale and purchase agreement. Indeed ss. 91 to 99 of the Evidence Act 1950 deal directly with the exclusion of oral by documentary evidence. Section 91 of the Evidence Act 1950 is quite specific; it requires the production of the document itself for proof of its contents. While s. 92 of the Evidence Act

1950 would become operative once the document has been produced and its production would certainly exclude evidence of any oral agreement or statement to contradict, vary, add to or subtract from its terms. The "best evidence rule" would always be the best. Sir John Wallis in *Tyagaraja Mudaliar & Anor v. Vedathanni* [1936] MLJ Rep. 62, speaking for the Privy Council aptly said at p. 65 of the report:

> When a contract has been reduced to the form of a document, s. 91 excludes oral evidence of the terms of the document by requiring those terms to be proved by the document itself unless otherwise expressly provided in the Act, and s. 92 excludes oral evidence for the purpose of contradicting, varying, adding to, or subtracting from such terms. Section 92 only excludes oral evidence to vary the terms of the written contract, and has no reference to the question whether the parties had agreed to contract on the terms set forth in the document. The objection must therefore be based on s. 91 which only excludes oral evidence as to the terms of a written contract. Clearly under that section a defendant sued, as in the present case, upon a written contract purporting to be signed by him could not be precluded in disproof of such agreement from giving oral evidence that his signature was a forgery. In their Lordships' opinion oral evidence in disproof of the agreement (1) that as in *Pym v. Campbell*, 6 E. & B. 370, the signed document was not to operate as an agreement until a specified condition was fulfilled, or (2) that as in the present case, the document was never intended to operate as an agreement but was brought into existence solely for the purpose of creating evidence of some other matter stands exactly on the same footing as evidence that the defendant's signature was forged. In *Pym v. Campbell*, the defendants were sued upon a written contract to purchase an invention, and Lord Campbell had ruled at the trial that on the plea denying the agreement oral evidence was admissible that it had been agreed between the parties before they signed that there was to be no agreement until invention was approved by A. In his judgment discharging the rule nisi for a new trial, Lord Campbell said:
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> > It was proved in the most satisfactory manner that before the paper was signed, it was explained to the plaintiff that the defendants did not intend the paper to be an agreement till A had been consulted and found to approve of the invention; and that the paper was signed before he was seen only because it was not convenient for the defendants to remain. The plaintiff assented to this, and received the writing on those terms. That being proved, there was no agreement.
> >
> > Erle J. who gave judgment first had dealt more fully with this question:

> The point made is that there is a written agreement absolute on the face of it, and that evidence was admitted to show that it was conditional; and if that had been so it would have been wrong. But I am of opinion that the evidence showed that in fact there was never any agreement at all. The production of a paper purporting to be an agreement by a party with his signature attached, affords a strong presumption that it is his written agreement; and, if in fact he did sign the paper animo contrahendi, the terms contained in it are conclusive and cannot be varied by parol evidence …. but, if it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible.

The Indian legislature has thought well to give statutory effect to the decision in *Pym v. Campbell* in proviso 3 to section 92:

> The existence of any separate oral agreement constituting a condition precedent to the attaching of an obligation under any such contract …. may be proved;

and in *Mottayappan v. Palani Goundan,* 38 Mad. 226 Benson and Sundara Ayyar JJ. have expressed the opinion that oral evidence to show that a document was never intended to operate according to its terms, but was brought into existence, as in the present case, solely for the purpose of creating evidence about some other matter, is admissible under proviso1 to section 92, 'any fact may be proved which would invalidate any document.' This may well be so, but in their Lordships' opinion, even if there were no provisos to either section, the result in the present case would be the same, because there is nothing in either section to exclude oral evidence that there was no agreement between the parties and therefore no contract. It was also contended that the case came within section 92, because of the provision recognising the widow's title to the jewels in her possession. The High Court have found that this provision was not intended to operate as an agreement, but was introduced to give verisimilitude to the document, it being usual to make such a provision in agreements for a widow's maintenance. Further, it was held by this Board in the passage already cited from the judgment in *Pertab Chunder Ghose v. Mohendra Purkait*, that if the defendants were told that any stipulation in the agreement would not be enforced, they could not be held to have assented to it. Consequently the document was not the real agreement between the parties, and the plaintiff could not sue upon it. In their Lordships' opinion both the lower Courts were right in finding on the oral evidence in this case that there was no contract, and they will humbly advise His Majesty that the appeal be dismissed with costs.

In *Damu Jadhao v. Paras Nath Singh* [1965] 2 MLJ 38, 39, Ambrose J observed:

> Counsel for the defendant submitted that under section 92 of the Evidence Ordinance no evidence other than the document could be given in proof of the terms of the alleged contract of loan. This section provides as follows:
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> > When the terms of a contract … have been reduced by or by consent of the parties to the form of a document, … no evidence shall be given in proof of the terms of such contract, … except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.
>
> In my view section 92 applies only when all the terms of the contract have been reduced by or by consent of the parties to the form of a document. Support for this view is to be found in *Sheo Nath Prasad v. Sarju Nonia* ILR [1943] All 610 and *Perumal Chettiar v. Kamakshi Ammal* ILR [1938] Mad. 933. One of the terms of the alleged contract was the consideration for the defendant's promise to pay $2,500. On looking at the document and the pleadings I found that it was impossible to say that all the terms of the alleged contract had been embodied in the document. I ruled therefore that section 92 of the Evidence Ordinance did not apply and that evidence other than the document could be given in proof of the terms of the alleged contract.

Other learned judges in other cases also adopted the same reasonings. It would therefore be ideal to read the following cases:

(1) *Lee Wah Bank Ltd v. Ng Kim Lek & Ors* [1979] 1 MLJ 21, FC;

(2) *Tan Chong & Sons Motor Company (Sdn) Bhd v. Alan McKnight* [1983] 1 CLJ 77; [1983] CLJ (Rep) 394, FC;

(3) *Tan Chong And Sons Motor Company Ltd. v. Yang Chin Lang* [1967] 1 MLJ 123;

(4) *Lebai Taib v. Abdul Ghani & Anor.* [1973] 1 MLJ 109, FC; and

(5) *Koh Siak Poo v. Perkayuan OKS Sdn Bhd* [1989] 1 CLJ 30; [1989] 2 CLJ (Rep) 1.

Here, the sale and purchase agreement dated 20 January 1988 has been exhibited and marked as exh. "KYS1" of encl. 5. That sale and purchase agreement contains the following recital:

> AND WHEREAS the Vendor has agreed to sell and the Purchaser has agreed to purchase the said Land (referring to the said property) free from all encumbrances, charges and liens and with vacant possession but subject to all the express and implied conditions in the document of title thereto at a total purchase price of Ringgit: SIX HUNDRED AND THREE THOUSAND (M$603,000.00) only in accordance with all the terms and conditions hereinafter expressed.

and it clearly shows that the sale was with vacant possession. This piece of evidence certainly goes against the grain of the first defendant's averment that the sale and purchase agreement does not contain a clause giving the plaintiff vacant possession thereof. Chang Min Tat FJ writing a separate judgment for the Federal Court in the case of *Tindok Besar Estate Sdn. Bhd. v. Tinjar Co.* [1979] 2 MLJ 229 had this to say of s. 92 of the Evidence Act 1950 (see p. 233 of the report):

> It is not the case of the respondent that any of the provisoes to section 92, except possibly proviso (a), applies. Its contention therefore for the admission of the parol evidence which won the approval of the learned judge was that not all the terms had been incorporated in the agreement. If this contention so generally stated and understood had any foundation at law, then it would be open to any party to a litigation concerning an agreement to say that the agreement which is the subject matter of the dispute, did not contain all the terms thereof and to seek to introduce such terms or even terms which might not even have been within the contemplation of the other party. No agreement would then be safe from being re-written by one party in a court of law. I think and I say so with respect, the fundamental mistake made by the learned judge is to conclude simply and without qualification that section 92 applies only to a case where all the terms of the agreement have been reduced to writing. But that is not what section 92 says. It merely says 'where the terms …" and by referring back to section 92, it means where the terms of a contract have been reduced to writing, as in this particular agreement they had been, the contract could only be proved by the document itself, and it is not open to the respondent to seek to introduce and the judge to admit evidence that would, inter alia, add new terms to it.

That would be the correct exposition of the law.

Put differently, s. 92 of the Evidence Act 1950 excludes the evidence of oral agreements, and that section applies to cases where the terms of the contracts, grants or other dispositions of property have been proved by the production of the relevant documents themselves under s. 91 of the Evidence Act 1950. So, if a document has been produced to prove its terms under s. 91 of the Evidence Act 1950, like the present case, then the provisions

of s. 92 thereof would come into operation for the purpose of excluding evidence of any oral agreement or statement for the purpose of contradicting, varying, adding to or subtracting from its terms.

As I understand it, s. 91 of the Evidence Act 1950 lays down the rule of universal application and it is not confined to the executant or executants of the documents. But, s. 92 of the Evidence Act 1950 applies only between the parties to the instrument or their representatives in interest.

Now, reverting back to the narration of the facts, the plaintiff says that he cannot comprehend as to how the purchase price can clearly indicate an express condition that the defendants and his father could occupy the property for as long as they lived. He categorically says that he is now the legal and registered owner of the said property and as such he has every right to possession of the said property. He says that nothing whatsoever raised by the defendants could constitute or afford the defendants a defence in law to his claim to vacant possession of the property because he is the legal and registered owner of the said property. He says that whether the first defendant is the widow or the second defendant is the daughter of his late father is not in issue to his claim to vacant possession because he is the legal and registered owner of the said property. He says that he is under no obligation or legal duty to provide shelter to his late father's wives, daughters or persons who may have been associated or had a relationship with his late father. He verily believes that the defendants have no defence to his claim and that the issues raised are irrelevant and are merely a ploy to continue with the unlawful and unauthorised occupation of his property and it is an abuse of the process of the court to delay these proceedings.

The first defendant responded and she says that she married the late Dato' Khoo Meng Kee according to Chinese customary rites and became his second wife sometime prior to 1964. She says that the marriage rites was conducted by a tea drinking ceremony in the presence of the late Dato' Khoo Meng Kee's mother and his first wife. She says that during the lifetime of her late husband, she was accorded and enjoyed all the privileges and benefits as a legal wife of her late husband. She then refers to an official invitation from the Pahang State Government to her late husband and herself to witness a police tattoo on 27 October 1999. She says that in that invitation she was addressed as Datin Ng Choo Peng. She too refers to a photograph that was taken at the funeral ceremony of the mother of the late Dato' Khoo Meng Kee where she says that she was placed between the late Dato' Khoo Meng Kee and his first wife. She says that it is abundantly clear that she is the lawful widow of the late Dato' Khoo Meng

Kee. She too says that the second defendant was accepted by both her late husband and herself as their lawful child. She refers to the birth certificate of the second defendant as proof of her assertions. For these reasons, she prays that the application in encl. 6 be dismissed with costs.

By way of a rebuttal, the plaintiff says that the relationship which the first defendant had with his late father is wholly irrelevant to his claim for vacant possession of the said property. He is advised by his solicitors and he verily believes that there is no obligation in law for a son to shelter or give accommodation to his own parents let alone one's late father's other wives. He verily believes that both the defendants have no defence to his just claim and he says that the contents of the defendants' affidavits are an attempt to delay giving him vacant possession to the said property.

Analysis

I have deliberately set out the facts in great detail in order to understand the issues that arose from it.

If it was said that the plaintiff was trying to evict and gain vacant possession of the said property and throw out his step mother and his step sister onto the streets in Kuala Lumpur, I must, by way of a retort, say that that was not so. Paragraph 11.2 of the defence to counterclaim carries the following averment:

> The plaintiff avers that his late father more than adequately provided for the first and second defendants by purchasing a condominium in the vicinity of Ampang, Kuala Lumpur and another apartment in River Valley Road, Singapore as he did not wish to foist the burden of providing for the first and second defendants on one or any of his other children.

At any rate, the relationship between the parties are of no significance at all. This court is not concerned about the issue of morality. Rather, of crucial importance is this: that the plaintiff is the registered proprietor of the said property. Under the Torrens system, title to or interest in land vests and divests only upon registration. Registration under the National Land Code 1965 ("NLC") constitutes the final stage of any dealings in land. Upon registration, the plaintiff in whose favour the registration has been effected will obtain an indefeasible title to or interest in the said property (see s. 340(1) of the NLC). It is a title or an interest which is free of all adverse claims or encumbrances not noted in the register. Thus, the effect of registration is to defeat all prior unregistered claims (*Bank Bumiputra Malaysia Bhd v. Mahmud bin Hj Mohamed Din* [1989] 1 CLJ 1048; [1989] 1 CLJ (Rep) 326, *Associated Credit Corporation Sdn Bhd v. Fahlum*

Development Sdn Bhd & Anor [1990] 2 CLJ 952; [1990] 1 CLJ (Rep) 615 and *Krishnadas Achutan Nair & Ors v. Maniyam Samykano* [1993] 4 CLJ 247). But, indefeasibility is not absolute because, under certain circumstances, a registered title or interest may be set aside or defeated by one with a better claim. These circumstances are spelt out under s. 340 of the NLC and it is ideal to reproduce that section and I shall do so now:

340. Registration to confer indefeasible title or interest, except in certain circumstances.

(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible:

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means or an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2):

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

(4) Nothing in this section shall prejudice or prevent:

(a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or

(b) the determination of any title or interest by operation of law.

In the absence of such circumstances as enumerated in s. 340 of the NLC, the title or interest is indefeasible (*Teh Bee v. K. Maruthamuthu* [1977] 2 MLJ 7 FC; and *Ong Chat Pang & Anor v. Valliappa Chettiar* [1971] 1 MLJ 224 FC). Here, on the facts, the circumstances as enumerated in s. 340 of the NLC are totally absent. Put it in another way, in the absence of any of the vitiating factors as laid down in s. 340(2) of the NLC, a title, once registered, is indefeasible. The Court of Appeal in the case of *Fels v. Knowles* 26 NZLR 604 at p. 620 aptly said:

> The cardinal principle of the statute is that the register is everything, and that except in cases of actual fraud on the part of the person dealing with the registered proprietor such person upon the registration of the title under which he takes from the registered proprietor has an indefeasible title against all the world.

Here, from the facts, the defendants did not allege that there was fraud initiated by the plaintiff in effecting the transfer of the said property to himself. In *PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136, Raja Azlan Shah CJ (Malaya) (as His Majesty then was) said at p. 138 of the report:

> As it stands the registered title of the said land in the hands of the second and third appellants is indefeasible. The concept of indefeasibility of title is so deeply embedded in our land law that it seems almost trite to restate it.

It must be recalled that the defendants refused to quit and refused to deliver vacant possession to the plaintiff and the defendants say that "they are entitled to stay on the said property for as long as they live and for as long as they wish." In their counterclaim, the defendants sought for a declaration that they are entitled to remain on the plaintiff's property during their lifetime without disturbance by the plaintiff.

These are but wishful thinking. At best, the defendants may be described as gratuitous or bare licensees. In that position, the plaintiff as the licensor can revoke the licence at will and at any time. The learned authors of *Halsbury's Laws Of Malaysia*, vol. 8, at p. 548 to p. 549 succinctly said:

> Generally, the licence is gratuitous and it does not create an interest in the land to which it relates, it only makes lawful an act which otherwise would be unlawful (*Thomas v. Sorrel* [1673] Vaugh 330 at 351; *Heap v. Hartley* [1880] 42 Ch D 461 at 468, CA (Eng)) so it is a defence to an action in trespass (*Titular Roman Catholic Bishop of Penang v. Stephen Ramachandran* [1994] 3 MLJ 4). A person cannot grant a license to himself, nor to himself jointly with another. A purely personal licence is not assignable. It is revocable by notice at any time, and is revoked by the death of either party, or by an assignment of the land over which it was granted. Once permission has been withdrawn, the licensee has a reasonable time to quit the land, thereafter he becomes a trespasser. No remedy is available to the bare licensee on the withdrawal of permission because the nature of the interest is that it is determinable at will by either party.

Continuing at p. 552, the learned authors of *Halsbury's Laws Of Malaysia*, vol. 8, aptly said:

> A tenancy at will is implied where a person in possession by the owners consent (*Wheeler v. Mercer* [1957] AC 416, [1956] 3 All ER 631, HL) and his possession is not as employee (As to employee see generally [120] EMPLOYMENT) or agent (As to agent see generally CONTRACT & AGENCY) or as a licensee holding under an irrevocable licence (*Errington v. Errington and Woods* [1952] 1 KB 290, [1952] 1 All ER 149, CA (Eng)). Such a tenancy is implied accordingly in cases of mere permissive occupation without payment of rent (*Doe d Groves v. Groves* [1847] 10 QB 486).

According to the case of *Petronas Dagangan Sdn Bhd v. Omar bin Abdul Samad* [1996] 4 MLJ 391, a bare licence without any contractual term in favour of the licensee can be revoked at will by the licensor. This would certainly be the case for the defendants. As bare licensees, the defendants had no say at all. Whatever licence that was accorded to the defendants had been revoked by the plaintiff when he sent those notices to quit occupation and to deliver up vacant possession.

I will now allude to the doctrine of equitable estoppel. For the doctrine to apply, it is said that the defendants must prove that they had been led to expend money on the said property under an expectation created or encouraged by the plaintiff that the defendants will as a result of that expenditure be able to remain on the said property *(Petronas Dagangan Sdn Bhd v. Omar bin Abdul Samad (supra))*. In the present case before me, there was no evidence at all to compel me to apply the doctrine of equitable estoppel in favour of the defendants. There was no evidence of

any inducement or encouragement by the plaintiff or some expectation held out by the plaintiff to both the defendants where on the strength of which both the defendants had expended money on the said property. This was my judgment and I so hold accordingly.

I must now refer to the case of *Wee Kang Whye & Anor v. Lee Woon Tong* [1974] 1 MLJ 7, a decision of Choor Singh J. There at p. 9 to p. 10 of the report, his Lordship Choor Singh J had this to say:

> The arrangement under which the defendant was permitted to construct his temporary structure on the plaintiffs' land amounted in law to gratuitous licence. Such a bare licence without any contractual term in favour of the licensee can be revoked at the will of the licensor. See *Winter Garden Theatre Ltd v. Millennium Productions Ltd* [1948] AC 173. Under the circumstances of this case the defendant had no legal right to remain on the plaintiffs' land after he was requested to move out. The plaintiffs not only gave him reasonable notice that he had to move out when their sale of the land was completed but also offered him compensation in the sum of $5,000 for moving out. In my judgment the defendant became a trespasser when he refused to move out after due notice.
>
> Counsel for the defendant submitted that the defendant by virtue of the expenditure incurred by him in constructing the temporary structure, had an equitable right to remain on the land as long as he wished and that the plaintiffs were therefore not entitled to vacant possession of the area occupied by the defendant. Counsel cited *Ramsden v. Dyson* [1866] LR 1 HL 129; *Plimmer v. Wellington Corp* [1884] 9 App Cas 699; and *Inwards v. Baker* [1965] 1 All ER 446 in support of his submission. In my judgment, counsel had misapprehended the *ratio decidendi* of the cases cited by him. In *Khew Ah Bah v. Hong Ah Mye* [1971] 2 MLJ 86, I had occasion to consider all these authorities concerning equitable estoppel and this is what I stated in that case, at page 88:
>
> > … It is quite plain from these authorities that, if the owner of land requires another, or indeed, allows another to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to enable him to stay there. And the case of a tenant who is paying ground rent for the use of the land on which he has been allowed to erect a dwelling-house is even stronger. He has a tenancy coupled with an equity. In such a case the landlord cannot recover possession of his land by merely terminating the tenancy; he must also satisfy the equity. In *Plimmer*'s case the Privy Council opined that the court must look at the circumstances in each case to decide in what way the equity can be satisfied. In the recent case of

> *Inwards v. Baker,* Lord Denning MR explained the doctrine as follows: 'It is an equity well recognized in law. It arises from the expenditure of money by a person in actual occupation of land when he is led to believe that, as the result of that expenditure, he will be allowed to remain there. It is for the court to say in which way the equity can be satisfied.
>
> In my opinion counsel for the defendant failed to appreciate that the doctrine of equitable estoppel applies only when the tenant has been led to expend money on the land under an expectation created or encouraged by the landlord that the tenant will as a result of that expenditure be able to remain there. For equity to intervene there must be evidence of some inducement or encouragement by the landlord or some expectation held out by him to the tenant on the strength of which the tenant expended money on the land. As explained by Lord Russel of Killowen in *Canadian Pacific Railway Co v. R* [1931] AC 414 at p 429: '… the foundation upon which reposes the right of equity to intervene is either contract or the existence of some fact which the legal owner is estopped from denying.'
>
> Upon the facts of the present case I could find no foundation for the application of any equitable doctrine in favour of the defendant. There was no conduct on the part of the plaintiffs which induced the defendant to build in the belief that rights in perpetuity would be acquired. There was nothing upon which to ground any estoppel. The facts were all the other way. It was the defendant who begged the plaintiffs to allow him to construct a temporary structure on their land. And before permitting him to do so they made it quite clear to him that he would have to vacate without compensation when requested to do. He accepted this condition and proceeded to build his temporary structure. No expectation was created by the plaintiffs, by word or by conduct, in the mind of the defendant that he would be allowed to stay on their land for any definite or indefinite period. Even on the defendant's own evidence, 'nothing was agreed'. Under the circumstances there was nothing which entitled the defendant to claim relief in equity.

That would be the correct exposition of the law. The sting of the law would shackle both the defendants to the ground. That would be the truth of the matter.

Next, I would refer to O. 89 r. 1 of the Rules of the High Court 1980 ("RHC") which states as follows:

> Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order.

The English equivalent to O. 89 r. 1 of the RHC would be O. 113 r. 1 of the Rules of the Supreme Court and Pennycuick VC in *Bristol Corp v. Persons Unknown* [1974] 1 All ER 593, 595 interpreted that rule as follows:

> Looking at the words of that rule, it seems to me to be clear that the order covers two different states of fact. The first is that of some person who has entered into occupation of the land without the licence or consent of the person entitled to possession or any predecessor in title of his, and secondly that of the person who entered into occupation of the land with a licence from the person entitled to possession of the land or any predecessor in title of his but who remains in such occupation without the licence or consent of the person entitled to possession or any predecessor in title. That that is the true construction appears to be perfectly clear from the use of the word 'or' and if the rule did not cover the second state of affairs which I have mentioned, that is to say of entry with licence and remaining in occupation without licence, then the words 'or remained' would, so far as I could see, have no significant meaning at all. Obviously there never could be proceedings against someone who had entered but did not remain in occupation of the land.

Lord Diplock in *Greater London Council v. Jenkins* [1975] 1 All ER 354 considered Pennycuick VC's interpretation of the rule and this was what Lord Diplock said at p. 356 of the report:

> Pennycuick V-C pointed out that it is clear beyond a peradventure that this order applies to cases where a person who is alleged to be a trespasser was previously on the premises by licence.
>
> In the course of his judgment in that case Pennycuick V-C did suggest that the judge or the court had a discretion whether to permit this summary procedure to be used in cases where there had been, as in this case clearly, a licence to occupy originally. For my part, I am unable to see that the court has any discretion to prevent a plaintiff using this procedure where the circumstances are those described in the rule. So, while agreeing, as I do, with Pennycuick V-C's construction of the rule, I personally would disagree that the court has any discretion to prevent the use of this procedure where circumstances are such as bring them within its terms.

In regard to a licensee, Syed Agil Barakbah J (as he then was) in *Yeap Cheng Hock v. Kajim – Taisei Joint Venture* [1973] 1 MLJ 230, 232 had this to say:

> At common law a licensee is one who is lawfully on the premises, in the sense that he is not a trespasser, but does not come within the description of an invitee because he does not enter on business which concerns the occupier. He is there with the permission of the occupier given as matter of grace or pleasure and not as a matter of business. 'Those who are invited as guests, whether from benevolence or for social reasons, are not in law invitees but licensees. The law does not take account of the worldly advantage which the host may remotely have in view.' (See *Charlesworth on Negligence* (4th edn) at p 207 para 438 and *Latham v. Johnson* [1913] 1 KB 398 at p. 410 per Hamilton LJ).

Now, from the available evidence, the defendants have no basis at all to resist the plaintiff's application for vacant possession. There was no defence open to the defendants. In fact, the defendants have no defence to the plaintiff's claim and, consequently, the defendants' counterclaim should be dismissed forthwith.

This was not the case like that of *Hardwick v. Johnson And Another* [1978] 1 WLR 683, a decision of the Court of Appeal (Lord Denning MR, Roskill and Browne LJJ). Factually speaking that case was entirely different from the present case. In that case, the plaintiff who had helped to buy a matrimonial home for her son and his first wife in their joint names and who had faced complications over the property when the marriage broke down, wanted to help her son again when he became engaged in 1972, but in the hope of avoiding the earlier problems she bought a home for 12,000 pounds in her own name for them to live in under a loose family arrangement that they should pay her 28 pounds per calendar month. They were married in April 1973; only a few payments of 28 pounds were made but the mother did not complain or demand payment of the unpaid moneys. By January 1975, the second marriage began to break down when the son took up with another woman soon after his wife had become pregnant; and in March he left the house while his wife remaining in it. The baby was born about June 1975.

The mother then brought proceedings in the county court for an order for possession of the house as against her son and his wife, alleging, *inter alia,* an oral agreement for a licence granted to her son only on payment of 7 pounds a week, or alternatively a weekly tenancy which, she claimed, had been terminated by notice to quit served on the son; and she also claimed

unpaid arrears of 700 pounds as rent or payments due and mesne profits of 7 pounds a week from the date of her claim until possession. The son did not effectively defend the claim; but the wife put forward a variety of defences, including the defence that she was a protected tenant who had tendered "rent" in January 1975 which had been refused and also the defence that she remained in occupation, *inter alia*, by virtue of her rights under the Matrimonial Homes Act 1967. The deputy circuit judge dismissed the claim for possession on the ground that the mother had granted a joint licence to her son and his wife on payment by them of 28 pounds per calendar month and that the wife with the baby was entitled to remain in occupation as a joint licensee on payment of 7 pounds a week and arrears of 112 pounds from January 1975. The mother appealed and the Court of Appeal dismissed her appeal and held that where the house occupied under an informal family arrangement at a time when none of the parties had contemplated what was to happen if the marriage broke up, the court itself had to spell out the resulting legal relationship by imputing to the parties a common intention which in fact they never formed, that on the evidence and in all the circumstances the most fitting legal relationship to impute was a grant by the mother as owner of the house to her son and his wife of a joint contractual licence (as per Roskill and Browne LJJ), and a joint equitable licence in the words of Lord Denning MR, to live in the house on payment of 28 pounds per month; that the mother had by her conduct shown that she was willing to postpone though not to waive or discharge the payments; that the deserted wife and her child were by virtue of that joint licence entitled to remain in the house after the husband had left it on payment of 7 pounds a week; and that the mother would not revoke or determine that licence until some event occurred which would justify bringing it to an end.

In *Hardwick v. Johnson And Another (supra)*, the son did not divorce his wife and there was not even a judicial separation. The son left the house and his wife remained there with her young child. And the Court of Appeal was prepared to "look at all the circumstances and spell out the legal relationship." This was what Lord Denning MR had to say at p. 688 of the report:

> So we have to consider once more the law about family arrangements. In the well-known case of *Balfour v. Balfour* [1919] 2 KB 571, 579, Atkin LJ said that family arrangements made between husband and wife 'are not contracts … because the parties did not intend that they should be attended by legal consequences.' Similarly, family arrangements between parent and child are often not contracts which bind them: see *Jones v. Padavatton*

[1969] 1 WLR 328. Nevertheless these family arrangements do have legal consequences: and, time and time again, the courts are called upon to determine what is the true legal relationship resulting from them. This is especially the case where one of the family occupies a house or uses furniture which is afterwards claimed by another member of the family: or when one pays money to another and afterwards says it was a loan and the other says it was a gift: and so forth. In most of these cases the question cannot be solved by looking to the intention of the parties, because the situation which arises is one which they never envisaged, and for which they made no provision. So many things are undecided, undiscussed, and unprovided for that the task of the courts is to fill in the blanks. The court has to look at all the circumstances and spell out the legal relationship. The court will pronounce in favour of a tenancy or a licence, a loan or a gift, or a trust – according to which of these legal relationships is most fitting in the situation which has arisen: and will find the terms of that relationship according to what reason and justice require. In the words of Lord Diplock in *Pettitt v. Pettitt* [1970] AC 777, 823:

> … the court imputes to the parties a common intention which in fact they never formed and it does so by forming its own opinion as to what would have been the common intention of reasonable men as to the effect.

of the unforeseen even if it had been present to their minds.

Here, in the present case, there was no legal relationship whatsoever between the plaintiff and the defendants. The death of the plaintiff's father on 13 January 2001 brought an end to everything. As a registered proprietor of the said property, the plaintiff was entitled to vacant possession.

This case was also unlike that of *Tanner v. Tanner* [1975] 1 WLR 1346, a decision of the Court of Appeal (Lord Denning MR, Browne LJ and Brightman J). Tanner was a case about a deserted mistress with two young twin daughters. Marriage was not contemplated by the parties and Lord Denning MR spoke of the moral duty of a man to take care of his mistress and the two young twin daughters that were born out of wedlock in these words (see p. 1350 of the report):

> It is said that they were only licensees – bare licensees – under a licence revocable at will: and that the plaintiff was entitled in law to turn her and the twins out on a moment's notice. I cannot believe that this is the law. This man had a moral duty to provide for the babies of whom he was the father. I would go further. I think he had a legal duty towards them. Not only towards the babies. But also towards their mother. She was looking after them and bringing them up. In order to fulfil his duty

towards the babies, he was under a duty to provide for the mother too. She had given up her flat where she was protected by the Rent Acts – at least in regard to rent and it may be in regard also to security of tenure. She had given it up at his instance so as to be able the better to bring up the children. It is impossible to suppose that in that situation she and the babies were bare licensees whom he could turn out at a moment's notice. The plaintiff recognised this when he offered to pay the defendant 4,000 pounds to get her out. What was their legal position? She herself said in evidence: 'The house was supposed to be ours until the children left school.' It seems to me that enables an inference to be drawn, namely, that in all the circumstances it is to be implied that she had a licence – a contractual licence – to have accommodation in the house for herself and the children so long as they were of school age and the accommodation was reasonably required for her and the children. There was, it is true, no express contract to that effect, but the circumstances are such that the court should imply a contract by the plaintiff – or, if need be, impose the equivalent of a contract by him – whereby they were entitled to have the use of the house as their home until the girls had finished school. It may be that if circumstances changed – so that the accommodation was not reasonably required – the licence might be determinable. But it was not determinable in the circumstances in which he sought to determine it, namely, to turn the defendant out with the children and to bring in his new wife with her family. It was a contractual licence of the kind which is specifically enforceable on her behalf: and which the plaintiff can be restrained from breaking; and he could not sell the house over her head so as to get her out in that way. That appears from *Binions v. Evans* [1972] Ch. 359, 367 to 368.

If therefore the defendant had sought an injunction restraining the plaintiff from determining the licence, it should have been granted. The order for possession ought not to have been made.

At p. 1351 of the report, Lord Denning M.R. rounded up the matter in this way:

But what is to be done? The judge ordered possession in six weeks. Thereupon the local housing authority (as they usually do when an order for possession is made) provided accommodation for the defendant and the children. She moved out in pursuance of the order and does not ask to be put back now. Seeing that the order ought not to have been made and we reverse it, what is to be done? It seems to me that this court has ample power, when it reverses an order of the court below, to do what is just and equitable to restore the position as fairly as it can in the circumstances. The plaintiff has obtained an unjust benefit and should make restitution. In the circumstances the court can and should assess compensation to be

> payable by him. He has not been paying any maintenance for these children for years – ever since the defendant went into the house. It seems to me a reasonable sum for loss of this licence (which the defendant ought not to have lost) would be 2,000 pounds. So I would allow the appeal and say that the order for possession shall be set aside, and as compensation to her for being wrongly turned out, the sum of 2,000 pounds to be payable by the plaintiff. I would allow the appeal accordingly.

Obviously the mistress had moved out of the house in pursuance of the order of the court of the first instance and she chose not to return to the house and the Court of Appeal compensated her in the sum of 2,000 pounds. Here, the defendants still remained on the said property and refused to budge. In *Tanner v. Tanner (supra)*, Browne LJ who wrote a separate judgment was concerned as to the duration of the licence to be given to the mistress and her twin daughters and his Lordship expressed it in these words (see p. 1351 of the report):

> But I agree that there was here a licence by the plaintiff to the defendant for good consideration: it could not be revoked at will. What has troubled me is what the duration of this licence was to be. With some hesitation I agree with Lord Denning M.R.'s view of what it was to be; that is, in substance it was a licence to the defendant to occupy accommodation in the house so long as the children were of school age and such accommodation was reasonably required for her and the twins, subject to any relevant change of circumstances, such as her remarriage. I agree that the order by the judge on the application of the plaintiff involved a breach of that licence and that this court is entitled to compensate the defendant for the plaintiff's breach of contract in revoking the licence on the lines indicated by Lord Denning M.R.

Factually speaking too the case of *Siew Soon Wah & Ors v. Yong Tong Hong* [1973] 1 MLJ 133 was different from the present case. There, there was a tenancy agreement where by way of a consideration the tenant paid the sum of $8,000 to the house owner whereby the tenant was to rent from "the first day of June 1964 at a monthly rent of Dollars Two Hundred ($200) as long as the tenant wishes to occupy." The official translation of the tenancy agreement from the writing in Chinese character that was initiated by Ong CJ showed that "the tenancy shall be permanent." Viscount Dilhorne writing for the Privy Council (Lord Wilberforce, Viscount Dilhorne, Lord Pearson, Lord Kilbrandon and Lord Solmon) had this to say (see p. 134 of the report):

a What was meant by the words 'the tenancy shall be permanent' was made clear in the paragraph which followed. The landlord bound himself not to increase the rent as he liked and not to eject the tenant by force etc. In their Lordships' opinion the agreement was not so vague and uncertain as to be void for uncertainty. The intention clearly was that the landlord should let the premises to the respondent for as long a period as it was b within his power to do so and that he should not be able to eject the respondent so long as he paid the stipulated rent and that the respondent should be entitled to occupy the property so long as he wished and so long as he paid the rent. Section 47 of the Land Code (Chapter 138) of 1928 provided that no lease executed after the Code came into force should be c for a longer period than thirty years and section 221(3) of Act No. 56 of 1965 provides that the maximum period for which land can be let which does not consist wholly of alienated land – and the premises here did not consist of such land – is thirty years. So it was not in the landlord's power to grant the respondent a lease for more than thirty years.

d The agreement of 1st June 1964 not being a forgery, it may well be that the evidence of Chooi Siang Khoon, the proprietor of the respondent firm, and of his father Chooi Yong How that the agreement was copied from an earlier agreement when the rent was increased to $200 a month was true. Its terms indicate that the document, written as evidence of what had been agreed, was intended to relate back, apart from the increased rent, e to the commencement of the occupation of the premises by the respondent and, in the circumstances, it appears right to hold that the parties had agreed that from 1st February 1958 the respondent should rent the premises for as long as the landlord could let them and so long as the respondent wished to occupy them and paid the rent.

f Continuing further at p. 135 of the report, his Lordship remarked:

In this case the respondent occupied the ground floor since February 1958 and paid rent therefor. In February 1958 he paid the sum of $8,000 to his landlord. He cannot have done that for a tenancy of short duration. It must have been paid in consideration of the tenancy described in the g agreement of 1st June 1964.

In these circumstances there arose in the respondent's favour an equity or equitable estoppel protecting his occupation of the ground floor for the period of thirty years, that is to say, until the 28th February 1988. In their Lordships' opinion the order made herein by the Federal Court of Malaysia h (Appellate Jurisdiction) should be affirmed and the appeal dismissed.

i

On the facts, the case of *Siew Soon Wah & Ors v. Yong Tong Hong (supra)* was certainly distinguishable. There, there was a written agreement and the tenant had paid the sum of $8,000 as consideration to his landlord. The Privy Council vigorously applied the doctrine of equitable estoppel in favour of the respondent. Of pertinence is the speech of Viscount Dilhorne when his Lordship said (see p. 134 of the report):

> If the use of the word 'permanent' meant that the landlord was bound to let and the respondent to rent the shop in perpetuity, the agreement would be of no effect for, as Jessel M.R. said in *Sevenoaks, Maidstone & Tunbridge Ry Co v. London, Chatham & Dover Ry Co* [1879] 11 ChD 625 at page 635, there is no such thing in law as a lease in perpetuity.

Devi v. Francis [1969] 2 MLJ 169 was also a case that was not on all fours with the present case at hand. In that case, the appellant occupied that part of the respondent's land on which stood a house owned by the appellant. The appellant had commenced occupation of the said house after the purchase of the same from the respondent's mother and the terms of the purchase were incorporated in an agreement of sale in writing between them. The respondent subsequently gave one month's notice and claimed possession of the ground on which the house was erected alleging that the tenancy was of the ground on which the house was erected and terminable by one month's notice. In his defence, the appellant relied heavily on the agreement and contended that by cl. 4 of the agreement the tenancy had not been determined and that the "appellant was entitled to occupy the land and house by law and by the said agreement." Chang Min Tat J held, *inter alia*, that cl. 4 of the agreement provided for a contingency and until that contingency arises by an offer from the landowner or is frustrated by the delivery up of possession by the appellant, the tenancy must persist. What the appellant had bought was a house with a tenancy of the ground and a clear expectation of a right to purchase the land. Consequently, this must imply a condition of the agreement that the landowner or the respondent as her successor in title with notice would not terminate the tenancy by a month's notice until and unless the land had been offered to the appellant to purchase and she had refused. Chang Min Tat J too held that, on the facts, the equitable principle of an irrevocable licence would apply and the respondent would be prevented from terminating the tenancy on a month's notice. On a proper construction of cl. 4 of the agreement the tenancy was a month to month tenancy and accordingly indefinite in duration, until made definite by the offer of sale by the respondent to the appellant. Here, in the present case, there was no written agreement at all. Whereas in *Devi*

v. Francis (supra) the agreement gave a clear expectation of the right to purchase the land and that was the distinguishing feature of that case as opposed to the present case at hand.

These cases – referring to *Hardwick v. Johnson And Another (supra)*; *Tanner v. Tanner (supra); Siew Soon Wah & Ors. v. Yong Tong Hong (supra);* and *Devi v. Francis (supra),* are of no assistance to the defendants at all. The Court of Appeal in *Hardwick v. Johnson And Another (supra)* had to reckon with an informal family arrangement situation and it was prepared to look at all the circumstances and spell out the legal relationship and fill in the "blanks" for the parties. Here, I am not prepared to do so because there were no "blanks" to be filled in. Should I spell out the legal relationship in favour of the defendants? Certainly not.

When the plaintiff's father died on 13 January 2001, the property was already registered in the name of the plaintiff. The occupation of the said property by the defendants after 13 January 2001 was, at the most, in the nature of a tenancy at will. That would be the legal relationship of the parties. Such tenancy was created by implication when the plaintiff allowed the defendants to stay in the said property free of charge – without paying any rent. There are examples of tenancies at will. I may be forgiven, if I were to give some examples. Thus, where a tenant whose lease has expired holds over with the landlord's permission without paying rent on a periodic basis that would give rise to a tenancy at will (*Meye v. Electric Transmission Ltd* [1942] Ch. 290). Again, when a tenant takes possession under a void lease and has not paid a single rent, that is said to be in the nature of a tenancy at will. Even where an individual is allowed to occupy a house rent free and for an indefinite period, it is said that that is in the nature of a tenancy at will. In the context of the present case, the occupation of the said property by both the defendants was rent free. Now, under the law, a tenancy at will is determinable at the will of the plaintiff as well as the defendants. The plaintiff here is keen to obtain vacant possession and so he wants to determine that tenancy at will, if I may be allowed to use that language. So, the essence of the tenancy at will is this. That either party can determine it at will. A tenancy at will comes to an end when the plaintiff serves the writ of summons and the statement of claim claiming possession of the said property (*Martinali v. Ramuz* [1953] 1 WLR 1196).

As I said earlier, at best, the defendants too are mere gratuitous or bare licensees. The plaintiff has withdrawn his permission to let the defendants stay on the said property, and so as mere bare licensees the defendants have no remedy in law and they have to vacate the said property. The plaintiff

is entitled under the law to determine the permission to stay on the said property that was accorded to the defendants and such determination at will is perfectly legal and recognised under the law (*Thomas v. Sorrell* [1675] Vaugh 330; *Cowell v. The Rosehill Racecourse Co. Ltd* [1937] 56 CLR 605, 11 ALJR 32, Aust. HC).

Reverting back to the case of *Tanner v. Tanner (supra)*, Lord Denning MR was prepared to hold that the man in that case had a legal duty towards his mistress and the two young twin daughters whom he had fathered because the mistress had given up her flat in order to stay with him. The Court of Appeal was not pleased that the man wanted to turn out the mistress with the twins to the streets and to bring in his new wife with her family in his house. The Court of Appeal too held that there was a licence to be given to the mistress to stay in the house so long as the twins were of school going age, and so long as the mistress remain unmarried. It was for these reasons that when the mistress moved out of the house upon the order of the court of the first instance that the Court of Appeal awarded her compensation in the sum of 2,000 pounds. In the present case, the defendants would not be thrown out to the streets. Both the defendants have been well cared for by the plaintiff's late father. A condominium in the vicinity of Ampang in Kuala Lumpur and an apartment in River Valley Road in Singapore are awaiting in cue for the defendants once the defendants vacate the said property.

In *Siew Soon Wah & Ors v. Yong Tong Hong (supra)*, there was an agreement that the tenancy shall be permanent and on this basis the Privy Council held that the agreement was not vague and uncertain and held that the agreement was not void for uncertainty. Here, there was no tenancy agreement between the parties and the defendants were mere gratuitous or bare licensees.

In *Devi v. Francis (supra)*, Chang Min Tat J (as he then was) applied the equitable principle of an irrevocable licence and his Lordship held that the respondent there cannot terminate the tenancy on a month's notice. Factually speaking, the facts in the present case are poles apart from *Devi v. Francis (supra)*.

Be that as it may, it would now be apparent that those cases which I had highlighted were based on an entirely different set of facts. No two cases are alike. Each case must be considered on its own facts.

In my judgment, there was no basis whatsoever for the defendants to say that they could stay at the said property for an indefinite period of time. To say that the summons in chambers in encl. 6 seeking an order for vacant possession together with an order for striking out of the defendants' counterclaim was not permissible was an attempt to put wool over the eyes of the court. It must not be forgotten that the counterclaim flows naturally from the defence and if the O. 14 application is allowed then it follows that the counterclaim must collapse like a deck of cards. It is germane to mention that the RHC has been given a new facelift by way of a gazette notification *vide* PU (A) 197 with effect from 16 May 2002 which brings into the picture a new r. 3 to O. 2 of the RHC. That new r. 3 is worded in this fashion:

> Preliminary objection for non-compliance of rules not allowed (O. 2 r. 3)
>
> 3. A court or judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

By the same gazette notification, there is also a new O. 1A of the RHC and it is worded as follows:

> COURT OR JUDGE SHALL HAVE REGARD TO JUSTICE
>
> In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

These timely amendments have put the courts ahead of its time. I must now have due "regard to the justice of the particular case" and I must now determine whether the non-compliance with the rules "has occasioned a substantial miscarriage of justice." I have undertaken these exercises vigorously to the best of my ability, and I must say that justice requires me to adjudicate encl. 6 forthwith notwithstanding the manner in which it was framed and phrased and in doing so there is no substantial miscarriage of justice at all. This was my judgment and I so hold accordingly.

For the reasons adumbrated above, I must dismiss encl. 13 with costs.